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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-936

NEW HAVEN WATER COMPANY
CONNECTICUT-AMERICAN WATER COMPANY, Appellants

v.

THE DIVISION OF PUBLIC UTILITY CONTROL
WITHIN THE DEPARTMENT OF BUSINESS REGULATION OF
THE STATE OF CONNECTICUT, Appellee

On Appeal from the Superior Court of the Judicial District of Hartford-New Britain at Hartford of the State of Connecticut

JURISDICTIONAL STATEMENT

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v.
THE DIVISION OF PUBLIC UTILITY CONTROL
WITHIN THE DEPARTMENT OF BUSINESS REGULATION OF
THE STATE OF CONNECTICUT, APPELLEE

On Appeal From The Superior Court of The Judicial District of Hartford-New Britain At Hartford of the State of Connecticut

JURISDICTIONAL STATEMENT

The New Haven Water Company and Connecticut-American Water Company, the appellants, appeal from the final judgment of the Superior Court of the Judicial District of Hartford-New Britain at Hartford of the State of Connecticut, dated May 12, 1979, and filed with the Clerk of the Court May 14, 1979, declaring that Sections 7, 411.6 and 411.7 of the Uniform System of Accounts prescribed by regulation for Connecticut water utilities, on their face and as applied in ratemaking proceedings, are legal regulations and finding such regulations not to violate the Fifth and Fourteenth Amendments to the Constitution of the United States.[1]

[1] The judgment appealed from was entered in three separate proceedings that had been consolidated for trial. Of these three cases, these appellants were parties in only this declaratory judgment action. The other two actions consolidated for trial below were appeals from ratemaking proceedings involving respectively the Bridgeport Hydraulic Company (No. 117874 below) and the Litchfield Water Company (No. 015775 below). Those companies were also nominal

OPINIONS BELOW

The opinion of the Superior Court of the Judicial District of Hartford-New Britain at Hartford of the State of Connecticut, which appears in the appendix hereto, p. 1a *infra,* is not reported.

The order of the Supreme Court of the State of Connecticut denying certification for review is reported at 178 Conn. 775, 41 Conn. L.J. No. 6 at 12 (1979) and reprinted in the appendix hereto, p. 32a, *infra.* The order of the Supreme Court denying the timely petition to reconsider and rehear the petition for certification and subsequent order dismissing the appeal from the Superior Court are not reported. They are reprinted in the appendix hereto, p. 30a and 31a, *infra.*

JURISDICTION

The opinion and order of the Superior Court of the Judicial District of Hartford-New Britain at Hartford of the State of Connecticut was dated May 12, 1979 and filed May 14, 1979. A timely petition for certification for review was denied by the Connecticut Supreme Court on July 24, 1979. A timely filed motion for rehearing and reconsideration of the petition for certification for review was denied on September 19, 1979. The Connecticut Supreme Court dismissed the appeal taken from the Superior Court's decision on October 2, 1979. No further review is possible in any Connecticut court.

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defendants in the declaratory judgment action. Bridgeport Hydraulic Company and the Litchfield Water Company are appealing the judgment in all three cases through their counsel.

The declaratory judgment below was captioned *Greenwich Water Co., et al. v. Howard E. Hausman, et al.* (No. 108038 below). Three plaintiff companies in the case below, Greenwich Water Company, Mystic Valley Water Company and Noroton Water Company, have merged since the commencement of the declaratory judgment action and are now known as Connecticut-American Water Company. The caption has been changed in this jurisdictional statement to reflect accurately the official capacities of the defendants and the name change of the merged plaintiffs, in accordance with Supreme Court Rule 48(3) and (4).

A notice of appeal to this Court was filed by New Haven Water Company on December 10, 1979 and by Connecticut-American Water Company on December 12, 1979 with the Clerk of the Superior Court for the Judicial District of Hartford-New Britain at Hartford and each is reproduced in the appendix hereto, p. 33a and 35a, *infra.*

This appeal is being docketed in this Court within 90 days from the denial of rehearing and reconsideration and the dismissal of the appeal by the Connecticut Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). This Court's opinions in *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Rock,* 279 U.S. 410 (1929) and *Sultan Railway and Timber Co.* v. *Department of Labor & Industries,* 277 U.S. 135 (1928) sustain jurisdiction over this appeal.

QUESTIONS PRESENTED

Whether Sections 7, 411.6 and 411.7 of the Uniform System of Accounts prescribed for Connecticut class A water companies, which, on their face and as applied in ratemaking proceedings, have the effect of taking gains realized by a company from the sale of land away from the shareholders of the company and using the gain to reduce the revenues which would otherwise be paid to the company by its ratepayers, take appellants' property without due process of law and without just compensation.

Whether the adoption of the aforementioned regulations and their application in ratemaking proceedings retroactively diminishes the value of a shareholder's interest in such company without due process of law.

CONSTITUTIONAL PROVISIONS AND RULES

Fifth Amendment, United States Constitution

No person shall . . . be deprived of life, liberty and property without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . . .

Connecticut Uniform System of Accounts (as amended in 1972), Sections 7, 411.6 and 411.7

These rules are reprinted in the Appendix hereto, p. 24a, *infra.*

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RAISING THE FEDERAL QUESTION

The complaint filed in the trial court raised the federal question at the earliest possible time. The trial court stated in its memorandum of decision that "[t]he issue here reduces itself to the question of whether the actions of the PUCA rises to a constitutional deprivation of property and whether the action is in deprivation of the statutory requirements imposed on it." p. 14a, *infra.* The trial court rejected appellants' Constitutional claims.

The Fifth and Fourteenth Amendment claims were reiterated in the petition for certification for review and the appeal filed by these appellants in the Connecticut Supreme Court, which declined to hear this case.

STATEMENT OF THE CASE

The appellant water companies ("the Companies") are public service companies organized under the laws of Connecticut. Each company is a Connecticut class A water company subject to the jurisdiction of the Public Utilities Commission for purposes, *inter alia,* of ratemaking, accounting,

and land disposition.[2] Each such company has been required to maintain its books and records in accordance with a Uniform System of Accounts promulgated by the Commission. The first Uniform System of Accounts was promulgated by the Commission in 1922.

In 1972, the Commission, by regulation, amended the Uniform System of Accounts prescribed for water utilities to create an accounting system whereby gains realized from the sale of land would no longer be credited to shareholders of the companies but would be used to reduce rates. The Companies brought a declaratory judgment action in the state court challenging the amendments as repugnant to the United States Constitution in that they operate to deprive the Companies of property without due process of law and take the Companies' property without just compensation.[3]

After an adverse decision by the trial court, the appellants sought review in the Connecticut Supreme Court by certification for review and by appeal; the two routes were followed because changes in the Connecticut Supreme Court's jurisdiction while the case was pending in the trial court rendered uncertain the appropriate procedural method for obtaining appellate review. The Connecticut Supreme Court denied certification for review and dismissed the appeal.

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[2] During the pendency of this case, the regulatory body with jurisdiction over the Companies has been named successively the Public Utilities Commission, the Public Utilities Control Authority, and finally the Division of Public Utilities Control. For simplicity, that body is hereinafter referred to as the Commission.

[3] The New Haven Water Company was an intervenor in a federal district court proceeding brought by other water companies in which these regulations were challenged on Constitutional grounds. The district court dismissed for lack of jurisdiction, on the basis that the Johnson Act, 28 U.S.C. §1342, rendered federal court review inappropriate, leaving for the state court a decision on the merits of the Constitutional question presented. *Bridgeport Hydraulic Co. v. Council on Water Company Lands,* 453 F.Supp. 942, 953-54 (D. Conn. 1977) (3-judge court), *aff'd* 439 U.S. 999 (1978). The issue here presented did not reach the Supreme Court on appeal from the district court.

The action was commenced pursuant to Conn. Gen. Stat. §4-175 which authorized a party aggrieved by an administrative regulation to seek a declaratory judgment that the rule was invalid. The Commission, the state office of consumer counsel (now the Division of Consumer Counsel), other water company parties and these appellants submitted a stipulation of facts which may be briefly summarized as follows:

1) The Companies and other water companies own a significant amount of land, which was acquired in connection with their utility operations. Because of changing technology imposed, in part, by the requirements of the Safe Drinking Water Act, 42 U.S.C. §300f, *et seq.*, the water companies are now able to dispose of a large number of acres of this land without any threat to the public health, safety or welfare. The New Haven Water Company, for example, which owns approximately 25,000 acres of land feels that it could dispose of as much as 15,000 acres.

2) In Connecticut, the reasonableness of water utilities' rates is measured, in large part, by the return earned by a company on its "rate base." The "rate base" is the original cost to a company of its utility plant, less accumulated depreciation and other adjustments not germane here. Land is included in the rate base only when used or useful to a company in the performance of its duties to the public.

3) Land is included in the rate base at its original cost rather than its current appreciated value. Although the value of land held by the companies has, in fact, appreciated significantly over time, rates are set at a level that does not provide for any return to the companies' shareholders for appreciation of land held in rate base. Similarly, the shareholders realize no gain when land is removed from rate base.

4) Land is not consumed over the time it is held in service by the water companies, so these water utilities do

not receive a depreciation allowance for the use of real property. The ratepayers, therefore, do not pay any depreciation on real property as they might on other types of property.

5) The total amount of revenues which a company is allowed to realize from its ratepayers is equal to the sum of the allowed return on rate base plus the level of operating expenses found to be reasonable by the Commission.

6) The Uniform System of Accounts in effect from 1922 to 1972 provided that gains from the sale of land were to be credited directly to "earned surplus", now known as "retained earnings". This account represents that portion of a company's earnings that can be paid out to stockholders as dividends or can be reinvested in utility plant. Thus, the impact of the accounting rule in effect for the fifty years prior to 1972 was that the common stockholders of a company benefited directly from gains realized by the company from the sale of land and, conversely, suffered a detriment from losses realized by a company from the sale of land.

7) The 1972 amendments to the Uniform System of Accounts require gains from the sale of land to be reported in the income statement as a hypothetical reduction of utility operating expenses, thereby reducing the revenue requirement to be paid by customer rates to meet such operating expenses at such a hypothetically reduced level and produce the allowed return on rate base.

8) The 1972 amendments were applied to the New Haven Water Company in a 1975 rate proceeding. There, the Company sought a rate of return of 9.8% on its rate base and the Commission found that rate of return to be fair. During the test year on which the rate proceeding was based, the Company had realized a gain of $126,462 from the sale of land. Over the years that this piece of land had been held in rate base, the company had never earned a return on its appreciated value.

In the 1975 proceeding, the Public Utilities Commission allowed the company a 9.8% return on rate base but applied the amendments to use the profit from the sale of land to reduce the total amount of revenues which would otherwise have been allowed. The Commission required that the gain of $126,462 be amortized against operating expenses over a three year period and, therefore, applied the sum of $42,154 to reduce the amount of annual revenues which would otherwise have been allowed.

9) The amendments have been similarly applied in subsequent ratemaking proceedings involving the New Haven Water Company and in proceedings involving other companies as well.

10) The amendments operate to take away appreciation in the value of the land prior to 1972. For example, even if the land were bought in 1924 for $100, were worth $100,000 just prior to the adoption of the amendments and were sold in 1974 for $105,000, the amendments require that all of the gain over acquisition cost be credited to ratepayers.

The Superior Court found, despite the reduction in revenues caused by the amendments as applied in ratemaking proceedings, that the rules were not repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States. The trial court concluded that deference to the expertise of the administrative agency mandated its denial of the Companies' request that the rules be declared unlawful. p. 19a, *infra*. The court did not explain why a court should defer to administrative expertise in a case in which the administrative rule itself is claimed to be unconstitutional. The trial court did not rule with respect to the Companies' claim that the amendments require a retroactive diminution of the shareholders' interest in the land to be sold, but the effect of the opinion was to find against appellants as to this claim also.

THE QUESTION IS SUBSTANTIAL

The question as to the limits imposed by the Constitution upon the power of a regulatory authority to limit the return earned by a regulated industry has, of course, been reviewed by this Court in conventional ratemaking contexts. *E.g., Permian Basin Area Rate Cases,* 390 U.S. 747 (1968); *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591 (1944). The Court has not, however, delineated the extent to which a state may compel a utility to subsidize its ratepayers through profits earned from the sale of land owned by a company. The appellants claim that the effect of the amendments to the Connecticut Uniform System of Accounts is to take the appellants' property for public use and without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. *See Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978).

In *Board of Public Utility Commissioners* v. *New York Telephone Co.,* 271 U.S. 23 (1926), the United States Supreme Court analyzed the relationship between a public utility and its customers. The court stated:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. . . . 271 U.S. at 32.

In *New York Telephone* this Court held it to be a violation of the Constitution for a public utility to be required to reduce revenues from its customers because of previous overcharges and to use the proceeds from its depreciation reserve to realize a fair return on its investment. *Id.* at 31-32.

More recently, courts in several states and the District of Columbia and two federal agencies have been presented with the question of whether gains from the sale of land can be used to offset rates. Four courts held that in the case before them the profit from the sale of a non-depreciable asset that is no longer

used in serving customers could not be used to reduce rates. In at least two cases, it is clear the courts thought that the reasoning of *New York Telephone* justified that result. *City of Lexington v. Lexington Water Co.*, 458 S.W.2d 778, 780 (Ky. 1970); *Keystone Water Co., White Deer Dist. v. Pennsylvania Public Utility Commission,* 19 Pa. Commw. Ct. 292, 339 A.2d 873, 877, 879 (1975) *aff'd by an equally divided court per curiam,* 477 Pa. 594, 385 A.2d 946 (1978). Other courts have found that such gains rightfully belong to shareholders but have not clearly articulated a Constitutional basis for that result. *Boise Water Corp. v. Idaho Public Utilities Commission,* 99 Idaho 158, 578 P.2d 1089 (1978); *Pennichuck Water Works v. New Hampshire,* 103 N.H. 49, 164 A.2d 669 (1960); *see Chicopee Manufacturing Co. v. Public Service Commission,* 98 N.H. 5, 93 A.2d 820 (1953); *contra, New York Water Service Corp. v. Public Service Commission,* 12 App. Div.2d 122, 208 N.Y.S.2d 857 (1960).

The Circuit Court of Appeals for the District of Columbia has rejected or severely limited the rationale of *New York Telephone* in determining whether ratepayers or shareholders should receive the benefit of gains earned from the sale of land. *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission,* 485 F.2d 786, 797 n. 82 (D.C. Cir. 1973), *cert. denied* 415 U.S. 935 (1974). That court explicitly announced that the Constitution did not require the result that a utility's assets remain exclusively the property of the shareholders. The court held that, when sold, the appreciation in such property was not Constitutionally required to be credited to the shareholders and reviewed the propriety of allocating gains under an analysis seemingly devoid of Constitutional foundation. *Id.* at 797 n. 82, 800-822; *Cf., Washington Public Interest Organization v. Public Service Commission,* 393 A.2d 71 (D.C. Ct.App. 1978) (rejects strict adherence to any rule).[4]

[4] Federal agencies have also struggled with the same issue and have reached conflicting results. *Compare Duke Power Co.*, 48 FPC 1384, 1394-95 (1972), *rehearing denied* 49 FPC 406 (1973), and Order No. 473, 49 FPC 390 (1973), (*New York Telephone* controls), *with American Tel. & Tel. Co.*, 64 FCC 2d 1, 65-66 (1977) (*D.C. Transit* controls).

The Connecticut Superior Court in the instant case simply deferred to agency expertise in allocating gains on the sale of land to ratepayers. That court gave only superficial consideration to the Constitutional issue posed.

This brief survey of decisions in this area of the law reveals the need for a decision from this Court as to the Constitutional issues posed. Technological changes have made it possible for water utilities to sell land but the Constitutional question of whether those gains must be attributed to shareholders has not been carefully analyzed.

Moreover, the Connecticut court's failure to consider the propriety of the adoption of the amendments in a manner that retroactively diminished the value of an equity interest in the Companies is indicative of the need for consideration of the power of a regulatory body to change its rules in a way that causes harsh retroactive effects. *See Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.,* 284 U.S. 370 (1932). That issue is analogous to that presented recently in a Contract Clause case, *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 249 (1978), where this Court was troubled by the "sudden, totally unanticipated, and substantial retroactive obligation" imposed by the law on the appellant company. Indeed, this Court noted in *Allied Structural Steel* the suggestion that the Due Process Clause of the Fourteenth Amendment occupies the same Constitutional ground as the Contract Clause. *Id.* at 241 n. 12.

The lower courts require guidance as to the Constitutional limitations upon the authority of regulatory agencies to compel a utility to subsidize its ratepayers and to wrench away gains realized on the sale of appreciated land. The Constitutional question presented by this appeal is substantial.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Date: December 14, 1979

No. 108038

GREENWICH WATER CO., ET AL.

VS.

HOWARD E. HAUSMAN, ET AL.

Superior Court

Judicial District
Hartford-New Britain
at Hartford

May 12, 1979

No. 117874

BRIDGEPORT HYDRAULIC COMPANY

VS.

PUBLIC UTILITIES CONTROL AUTHORITY, ET AL.

Superior Court

at Bridgeport

May 12, 1979

No. 015775

THE LITCHFIELD WATER COMPANY

VS.

PUBLIC UTILITIES CONTROL AUTHORITY

Superior Court

at Litchfield

May 12, 1979

MEMORANDUM OF DECISION

These cases represent an issue of first impression in this state. The three actions were consolidated by the parties and the courts because they required an answer to what is essentially the same lcgal question. The Greenwich Water Company (Greenwich) case is an action for a declaratory judgment. The Bridgeport Hydraulic Company (Bridgeport) and Litchfield Water Company (Litchfield) cases are appeals from the doings of the Public Utilities Control Authority (PUCA). Greenwich questions the legality of certain accounting regulations here-

inafter stated which were adopted effective January 1, 1972, by the P.U.C.A. *Bridgeport* and *Litchfield* also question the legality of the regulations and, in addition thereto, question the sufficiency of the required notice given by the PUCA antecedent to the adoption of the regulation.

The Greenwich action was initiated in December 1972 and was thereafter stayed because of the pendency of an action before a three-judge federal court brought by *Bridgeport (Bridgeport Hydraulic Company, et al.* v. *Council of Water Company Lands of the State of Connecticut,* U.S.D.C. (Conn) Civil No. B-75-212,) in which it was perceived by all parties that the federal decision might answer the question of alleged constitutional infirmities which are the crux of the cases here. The federal matter was finally decided with opinion in December 1977. *Bridgeport Hydraulic Company* v. *Council on Water Co. Lands,* 453 F.Supp. 942, summarily affirmed without opinion, 438 U.S. ____, 98 SCt. 2426 (1978).

While the results in the federal action did not resolve the immediate issue here, it did touch on some of those issues and the decision becomes important in noting what it did say and the rationale used in acknowledging the wide power of the state in taking action in controlling the use of privately owned land. Votes in the United States Supreme Court to affirm summarily are votes on the merits of the case. *Hicks* v. *Miranda,* 422 U.S. 332, 334. *Ohio ex rel Eaton* v. *Price,* 360 U.S. 246, 247. The precedential effect of a summary affirmance extends no further however that the precise issues presented and necessarily decided by the court below. *Mandel* v. *Bradley,* 432 U.S. 173; *Illinois State Board of Election* v. *Socialist Workers Party,* ____ *U.S.* ____, 99 S.Ct. 983, 985 (1979).

Greenwich (the action for declaratory judgment) was presented on a stipulation of fact and was joined in by counsel for *Bridgeport* and *Litchfield.* The stipulation can only apply to Greenwich, inasmuch as *Bridgeport* and *Litchfield* are administrative appeals and the administrative body, PUCA, made its own findings of fact.

Notwithstanding the numerous allegations as to what the issues are, they are reduced to these:

I

Was the required statutory notice given by the old Public Utility Commission in 1971 prior to the adoption of new accounting regulations, sufficient to put plaintiffs on notice as to the intent of the hearing of the PUC as gleaned from what regulations were actually adopted (Greenwich does not participate in this claim and concedes the notice is proper.).

II

Was the adoption of the new accounting regulations which had the effect of making gains from sales of unused land owned by the company and not then included in the rate base, available for consideration for consumer rate reduction, constitutional and within the power of PUCA to do; and was their adoption an abuse of discretion which prevented the company from earning a fair return on its investment and impaired its ability to attract capital.

WAS THE NOTICE SUFFICIENT

The Public Utilities Commission published notice in the Connecticut Law Journal (July 27, 1971 issue), the following of which is germane here:

"The following is a summary of the proposed changes

1. The adoption of the inclusive income statement in harmony with Bulletin 9 of the AICPA (American Institute of Certified Public Accountants). All items of revenue and expenses, including many previously charged or credited to surplus, with few exceptions will be included in the current income statement.

2. The inclusion of the gains or losses on sale of property held for future use and non-utility property in the other income or other income deductions section of the income statement, as appropriate.

3. Include the gains or losses on sale or other disposition of utility plant, in the utility operating income section of the income statement.

At that time, the process of adoption of regulations was controlled by Sections 4-42 and 4-43 of the General Statutes.

The court notes that the issue of inadequacy of notice was raised for the first time in the combined brief of Bridgeport and Litchfield and thereafter in oral argument. Nowhere is it mentioned in the appeal petition of either. Since counsel placed inordinate emphasis on it in argument, the court will address the issue; after noting that the issue was considered in the federal matter where the notice was found to be proper. *Bridgeport Hydraulic,* supra, 453 F.Supp. at 954, note 6 (3).

In our jurisprudence it is fundamental that a person has the right to notice and he should be given an opportunity to be heard at a meaningful time in a meaningful manner. *Armstrong* v. *Manza,* 380 U.S. 545, 552, before he can be deprived of any significant property interest. *Boddie* v. *Connecticut,* 401 U.S. 371, 379. In *Slagle* v. *Zoning Board of Appeals,* 144 Conn. 690, the Connecticut Supreme Court said at 693:

> "The fundamental reason for the requirement of notice is to advise all affected parties of their opportunity to be heard and to be apprised of the relief sought."

There is no requirement that the notice be an accurate forecast of the exact action which will be taken on the subject matter of the notice. "It is implicit in such a procedure that changes in the original proposal may ensue as a result of the views expressed at the hearing." *Neuger* v. *Zoning Board,* 145 Conn. 625, 630.

Bridgeport and Litchfield complain that the notice of the hearing gave no indication that the monies received from sales

of excess lands would be removed from the surplus account (below the line) where it was available for dividends to stockholders, expansion of plant and other stockholder use, and placed in the utility operating income action (above the line) and available to be used by the PUC in the rate-making process whereby rates charged consumer could be affected and possibly reduced.

A reading of paragraphs 1, 2 and 3 of the notice clearly indicates that the action taken by the PUC was fully within the perimeters therein outlined. As the court in *Neuger* stated, there is no requirement that the final action taken specifically be a part of the notice. In the notice here, it comes very close to being specific. The conclusion of the court is that the notice was adequate, and fairly apprised those who might be affected by the change so they could make adequate preparation to protest if they so chose, and to offer alternatives.

THE PARTIES

All involved water companies are classified Class A water companies, having annual operating revenue in excess of $50,000.00.

Greenwich is, as are all other water companies involved herein a private Connecticut corporation located in Greenwich, Connecticut. The amount of land which it owns does not appear. However, all of the privately owned water companies in the state own substantial acres of land in the state.

Bridgeport is a wholly owned subsidiary of The Hydraulic Company. Bridgeport, in turn, wholly owns Litchfield Water Company, North Canaan Water Company, Lakeville Water Company, Cornwall Water Company and the Norfolk Water Company. It owns almost 20,000 acres of land.

The New Haven Water Company is a party plaintiff in the Greenwich Water Company action and owns almost 25,000 acres of land. There are several other plaintiff water companies.

Litchfield, though wholly owned by Bridgeport, brought its own action of appeal and is not a participant in Bridgeport's action for a declaratory judgment.

All the companies are private but operating as public service companies under the regulatory authority of the PUCA pursuant to title 16 of the Connecticut General Statutes. All have shareholders.

The Public Utilities Control Authority (PUCA) is a state agency authorized by law to make regulations respecting Class A water companies.

BACKGROUND

Because of increased efficiency and scientific advances in the (1) treatment and purification of water, (2) development of public sewer systems, and (3) the adoption and enforcement of health and environmental laws, there has occurred, from time to time, less need for the watershed land which had been extensively acquired over long periods of time by the utility company. Some of these lands are not needed anymore in the water collection and purification process, have been taken out of the rate base, and are not part of the utility plant equipment any longer. These lands could now be sold at substantial gains over the original cost which averaged about $130.00 per acre.

Thirty-six private water companies own approximately 61,458 acres of realty in the state. Eighty to ninety per cent of this is watershed land which contributes to public water supply reservoirs. The largest owner is New Haven Water Company with 25,000 acres. The smallest is Cornwall Water Company with 8 acres.

Bridgeport and its subsidiaries own approximately 20,000 acres. All of the land except 930 acres were acquired prior to 1948, some acquisitions occurring prior to 1878. The average cost paid for the land over years was $138.00 per acre.

New Haven Water Company with its 25,000 acres, presents a similar picture, with acquisitions going back to 1860. The average paid through the years was $128.00 per acre.

Both Bridgeport and New Haven Water have power of eminent domain. New Haven Water never used it to acquire land and Bridgeport used it to acquire 4% of its purchases. The vast majority of the land was put in the rate base when purchased or soon thereafter and consumer rates were made with that as part of the consideration for rate setting for use of the company's property.

By being a part of the rate base, the consumers, over the years had to pay the utility companies for the use of the land in providing pure and adequate water, as it was part of the utility plant, although non-depreciable. In the case of Bridgeport, it started to remove the now surplus land from its rate base only in 1972. While it was in the rate base, it was there always as its original cost and not its appreciated value. All the water companies have followed that same general pattern.

Connecticut General Statutes § 16-6b and its predecessors gave the PUCA and its predecessor, PUC, the authority to adopt such regulations with respect to rates and changes, and *accounting practices* as it deems reasonable and necessary. In response to that authority and evident necessity, the commission adopted the Uniform System of Accounts; the first being adopted effective in 1922. There have been made several changes in the system since then by alteration in the system format. Changes were made thereafter in 1942, 1964 and finally in 1972—which was the catalyst for the present action.

The Uniform System of Accounts adopted by the Public Utilities Commission in 1964 provided that gains or losses on the sale of land be credited or debited to the surplus account (below the line). The surplus account is a portion of the equity of the company and is available for dividends to stockholders or to be invested in additional utility plant. Under the 1964 accounting procedures, this revenue was not available for the reduction of rates or other consumer purposes.

The Public Utilities Commission, effective January 1, 1972, adopted some amendments to the accounting procedures. The pertinent changes had the effect of putting the gains or losses

from the sale of excess land that had any time heretofore been in the rate base, into the operation income account (above the line) where it could be used in the rate setting procedures and available to possibly benefit consumers if it were a gain and burden them if it were a loss. Although the PUC adopted the regulations, they never put it into effect by considering the proceeds from the sale of land in the rate-making process and consumers did not garner any benefits. It was used for reporting purposes only.

The legislature effectively abolished the three-man Public Utilities Commission and set up in its stead in December 1975 the present five-man Public Utilities Control Authority (PUCA). In due time, the PUCA began implementing the accounting procedure changes adopted by the PUC, and began considering gains from the sale of land in the rate-making process. An example is shown in the decision of the PUCA in the application of Litchfield for an increase in rates.

Litchfield sold certain lands which had been previously in the rate base but had been removed from the utility operation as unneeded. There was a net profit of $108,933 realized on the sale. PUCA invoked the 1972 amendments, credited the gain to an operating income gain, and deemed "it appropriate to amortize the net profit . . . over a 7 year period." The gain was amortized into the rate-making structure at the rate of $15,562 per year; the pro tanto effect of which was to reduce the price of water to the consumer and to likewise reduce the amount available to the shareholders as dividends or for plant expansion.

Water companies are assessed for tax purposes the same as the general public or industry generally for similar property. These taxes on the real property are paid by the ratepayers. So are payments for improvement thereon. The property is carried on the book of the company, when in the rate base, at the original purchase price, and the consumer has to pay, in his rates, for the use of that land in helping furnish him water. And even though land purchased in 1860 for $38.00 per acre may have increased in value more than 10,000 per cent over the

years, it is still carried on the books at the original cost. Patently, with exploding populations, some of this land has become extremely valuable.

As aforestated, Bridgeport is a wholly owned subsidiary of the Hydraulic Company. The Hydraulic Company has formed another wholly owned subsidiary, Main Street South Corporation. Main Street South was formed to (1) engage in the real estate business by building, leasing, etc. and (2) acquire real estate from Bridgeport and its subsidiaries at market value and to hold it for present and future development and sale. Bridgeport, in its sale of land, ran afoul of the new accounting procedures and is appealing the doings of the PUCA in this respect.

Bridgeport had sold land from 1972 through 1976, but as aforestated the predecessor Public Utilities Commission had used the amended Uniform System of Accounts since its adoption in 1972, for reporting purposes only and not for a reduction in consumer rates. When Bridgeport came up for its rate increase, the new PUCA not only included gains from sale of land in 1976 but went back to 1972 and applied an average annual gain of $123,000 to reduce the level of ratepaying. PUCA insisted on conformity with the existing accounting regulations.

In Bridgeport's case, some of its lands were acquired through the exercise of its right of eminent domain. New Haven Water Company never acquired any of its land through the exercise of its power of eminent domain. New Haven Water Company has concluded that 15,903 acres of its land, out of a total of 24,733 acres, need not be owned by it in order to carry out its obligations to the public under the statutes, and these lands could be considered for disposal.

THE PUBLIC UTILITY AND PUCA

The concept of public utilities in the United States had its genesis in the acceptance by courts that transportation companies and bailees for hire were "regulatable in England from

time immemorial" *Munn* v. *Illinois*, 94 U.S. 115 (1876). There was thereafter an expansion of the public utility status from the common carrier to other businesses which

> "[H]ave a direct relation to the business or facilities of transportation or distribution—transportation by carriers of passengers, goods, or intelligence by vehicle or wire; to distribution of water, gas or electricty through ditch, pipe or wire, to wharfage, storage or accomodation of property before the journey begins, when it ends, or along the way." *German Alliance Insurance Co.* v. *Luvis*, 233 U.S. 389 (1913).

And the government has steadily expanded its regulation of industries which serve the general public and are thereby affected with a public interest. These regulated industries tend toward monopoly, are generally non-competitive, and they tend to operate more efficiently as monopolies. But as such, it is an economic power that is not controlled by the market place and the rates and services have been subjected to governmental control.

As one observes public utilities, he sees that private ownership overwhelmingly dominates. The result is that frequent conflicts occur between the private ownership and public control. The basic objective of the private corporation is the maximization of profits, while the public interest demands adequate service at the lowest possible price. The distances between these two objectives are often large and results in a sort of continuous conflict. The regulated company favors minimum regulation and the public usually demand maximum.

To supervise and regulate the various utilities, the state has created an administrative agency which has vested in it wide powers. This agency was the Public Utilities Commission, now the Public Utilities Control Authority.

Administrative agencies are those agencies of government which usually perform a combined legislative, judicial and executive function. The judicial function is performed through

adjudication. The executive function is performed by administering legislative policy, and the legislative function is performed by rule making.

In making rules and regulations which are to govern the activities of a public utility, the state is acting in the exercise of its police power. *Cedar Island Improvement Association* v. *Clinton Electric Light and Power Co.,* 142 Conn. 359, 370—that is the power of state to regulate business to safeguard the health, safety, morals and general welfare of its citizens. The "police power" is not mentioned in the Constitution but has long been recognized by the courts. See *Brown* v. *Maryland,* 12 Wheaton 419 (1827). *Charles River Bridge* v. *Warren Bridge,* 11 Peters 420 (1837).

The power to regulate businesses affected with a public interest is not unlimited, however.

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the demands of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U.S. 502, 505.

The method used and the extent of the exercise of the police power is determined by the legislature. *New Haven* v. *New Haven Water Co.,* 132 Conn. 496, 511. It is unconstitutional if it is exercised in an arbitrary or discriminatory manner. *Cedar Island* at 370.

A legislature may delegate to an administrative agency the power to make rules and regulations for the implementation of a statute, *Kellems* v. *Brown,* 163 Conn. 478, 499; *State* v. *Stoddard,* 126 Conn. 623, 628, but the statute to be imple-

mented, to survive constitutional attack must declare a legislative policy, establish primary standards or lay down an intelligible principle to which the instrumentality must conform. *Roan* v. *Connecticut Industrial Building Commission,* 150 Conn. 333, 341. Any rules or regulations which exceed statutory authority are void, however. *Berlinski* v. *Ouellette,* 164 Conn. 482, 492, Note. The statutory authority of the PUCA is copiously outlined in Connecticut General Statutes § 16-1 et seq. The rule making power is delineated in § 16-6b.[1]

All of the water companies in these three actions are so-called Class A water companies and all are contesting the validity of amendments to regulations adopted by PUC, which amendments became effective January 1, 1972. These amendments being questioned are part of a Uniform System of Accounts which was established to ensure uniform and consistent accounting practices and procedures for all Class A water companies. Each company is required to conform to the Uniform System of Accounts in maintaining its books. Some type of uniform system has been operative for over fifty years.

These amendments required that upon the sale of utility property and plant, *including land and land rights,* be accounted for in the income statement of the company, rather than in the surplus account. The uniform system of 1964 and before the subject amendments directed that the losses or gains on the sale of land or land rights be charged to the surplus account unless a reserve therefor had been provided; which is not the case here.

The effect of placing the gains or losses in the surplus account was that the proceeds never entered into the determination of company income, but was charged directly to the earned surplus account (below the line) and could be used to pay out dividends or could be invested in additional plant facilities of property.

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[1] Sec. 16-6b. The division of public utility control . . . may . . . adopt such regulations with respect to rates and charges, services, accounting practices, safety and the conduct of operations generally of public service companies subject to its jurisdiction as it deems reasonable and necessary.

The effect of the amendments which ordered the placement of gains or losses from sale of land in the company income statement (above the line) is that that income may be used by the PUCA in determining the rates to be paid by the consumer or in reducing that rate. In simple terms, if it were placed below the line (surplus) it is available for stockholders. If it is placed above the line (income) it is available to benefit the ratepayers. Therein lies the struggle—shareholders versus ratepayers.

It is noted that the vast majority of the subject lands fit no one particular pattern. Some have been included in rate bases and some have not. Some was acquired in the exercise of the right of eminent domain and some were not. Some lands were in the rate bases and subsequently withdrawn therefrom and some were not.

There are some common features however. The ratepayers paid the taxes on the land through payments for service. They also paid for improvements to the land for purposes in their interests. And all land, when entered into the rate making process, entered at the original purchase cost and remained that way.

THE ISSUE

The rate of return by a utility on its investment is based on common equity. The consumers are required through rate paying, to afford investors a reasonable return on their investment. If a parcel of land is entered into the rate base, it is at original cost and the ratepayer has to pay a reasonable return for the use of that property. He never pays at the appreciated value of the land.

While other parts of the utility plant are depreciable, land is not. The ratepayer pays for the depreciation of plant in his payment for service. Since land is non-depreciable, the consumer never pays for it through his rates.

Plaintiffs maintain that the subject amendments to the accounting rules "interfere with, impair and threaten to inter-

fere with the legal rights and privileges of the plaintiff by depriving them of their property without due process of law and by taking their property for public use without just compensation." They further contend that the inclusion by the PUCA of proceeds from the sale of land (and interest therefrom) is an abuse of the authority's statutory power and

> ". . . disregards the Authority's duty to approve rates which will (1) allow a fair and reasonable return on investment, (2) maintain [the company's] credit and financial integrity, and (3) allow [the company] to attract needed capital and maintain the requisite level of services, and said error denies [the company] due process of law and equal protection of the law and constitutes a confiscation. . . ." See Connecticut General Statutes § 16-19e(a).

To be sure the Fifth Amendment to the United States Constitution provides that no person shall be deprived of his property without due process of law, nor shall private property be taken for public use without just compensation. The Fifth Amendment was made binding on the states by the Fourteenth Amendment, *Malloy* v. *Hogan,* 378 U.S. 1. And the issue here reduces itself to the question of whether the actions of the PUCA rises to a constitutional deprivation of property and whether the action is in deprivation of the statutory requirements imposed on it.

The issue is novel in this state. There are a few decisions in other states directly on point. In the course of these decisions, some have clearly articulated the reasons for the holdings. Some have stretched the holdings of antecedent cases.

The case which appears to have started and given life to public utility land sale cases is *Board of Commissioners* v. *New York Telephone Co.,* 271 U.S. 23. The court there made several statements which have been cited repeatedly by advocates of utilities. Some are:

> "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to the capital of the company. By paying bills for service they do not acquire any interest, legal or equitable in the property used for their convenience or in the funds of the Company." at 32

And

> "Constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service." at 31

This language has been seized on as representing the proposition that a public utility regulating agency cannot, under any circumstances, consider proceeds from the sales non-depreciable land in its rate making function. Of course, *New York Telephone* does not so hold. There the Supreme Court had before it the question of whether consumers could benefit from excessive depreciation taken by the utility company in prior years, through an offset which would result in lower future rates. The court held that excess in the reserve for depreciation could not be used to make up the deficiency in current rates which made them confiscatory and not yielding a fair return.

There is no doubt that a public utility is entitled to just compensation and that

> "The just compensation safeguarded by the Fourteenth Amendment is a reasonable return on the value of the property used for the public service. And rates not sufficient to yield that return are confiscatory. *New York Telephone* at 31."

The majority of the courts which have considered the issue have leaned heavily on the system of accounts used by the rate setting authority. The New Hampshire Supreme Court leaned on the *system* used when it said

> "Under the system of accounts presented by the Commission as well as matter of general equity, the net profit belonged to the stockholders. If the [electric generating plant] had been sold at a loss, the deficit could not have

been charged to future consumers. By the same token a profit cannot be awarded to future consumers. *Chicopee Manufacturing Co.* v. *Public Service Co.,* 93 A.2d 820, 826 (1953)."

Plaintiffs have cited *Pennichuck Water Works* v. *State,* 164 A.2d 669 (N.H.) because it held that profits from land belonged to the general stockholder. They failed to note that *Pennichuck* relied on *Chicopee.*

Another case in the same vein is the *City of Lexington* v. *Lexington Water Company,* 458 S.W. 2d 779 (Ky) 1970. In that case the systems of accounts used was crucial. It said:

> "Under that system it was provided that a loss upon the sale of land is charged directly to the surplus account—to the shareholders. A profit is credited in the same manner. The water company followed this accounting system," at 779.

The court appears to be saying that risk of gain follows risk of loss. And where, under the accounting system, the consumers could not be charged with any losses on the undepreciable land, he could not partake in any benefits.

Lexington went on to distinguish between it and *New York Water Service Corporation* v. *Public Service Commission,* 208 N.Y.S. 2d 857 (1960) (Appellate Division). The distinction was stated as follows:

> "That case can readily be distinguished because of the difference in the accounting methods. The New York Public Service Commission had adopted a system of accounts in which the land sold at a loss was debited to the depreciation reserve account and land sold at a profit was credited to that account. The New York court held that the rate base was thus properly increased or reduced affording the company protection from a loss in the sale of land used on the operations, therefore it was proper to pass profits made thereby onto the consumers." *Lexington* at 779.

Indeed *New York Water Service Corp.* did so hold. Therein, the gain or loss under the accounting system was on the consumers. In *Lexington* the gain or loss was on the shareholders or the utility.

Boise Water Corp. v. *Idaho Public Utility Commission,* 578 P.2d 1089 (Idaho) (1978) is the only case which appears to support plaintiff's position here, and it cites *City of Lexington* v. *Lexington Water Co.,* discussed above, as its authority. However, the opinion appears to be additionally based on the fact that ratepayers do not pay depreciation on land, it being non-depreciable. The type of accounting system used in *Boise* does not appear, and the court did not consider it.

The longest opinion (72 pages) and the opinion which collates every case touching on the subject of utility land sale and the problem presented here and gives the most thorough discussion of the issue is *Democratic Central Committee of D.C.* v. *Washington M.A.T. Commission,* 485 F.2d 786 (1973) Cert. Den. 415 U.S. 935. In summing up its view of the numerous court decisions reviewed, the majority of that court concluded at page 798 that the decisions cannot be viewed as holding that capital gains on non-depreciable property inevitably belongs to the investors and may be accepted as applications of the broader principle *that the benefit of a capital gain follows the risk of capital loss:*

> "We cannot accept the thesis that appreciation in value . . . while in operating status automatically flows to [the] investors as inseparable incidents of ownership. *Democratic Central* at 805.

Democratic Central agrees that higher risks warrant a higher return but sees no risk involved in land, noting that historically land values have risen and any risk of financial loss has almost totally been foreclosed by the upward market. It opines at 811 that it is abstract logic to invoke "gain follows loss" where the risk of loss is wholly illusory as intended. In a separate opinion which concurred in the result and dissented in the rationale of the majority, Judge MacKinnon concludes that

his reason for supporting the result reached by the majority was based on utility commission rules and regulations.

> "There enters another powerful judicial doctrine—that of deference to agency adherence to rules promulgated under statutory authority unless *arbitrary* or *capricious.* Again the ultimate question is whether the equities of the situation are so overwhelming that we can say that the Commission's *adherence* to its uniform system of accounts and its uniform administrative pronouncements was clearly arbitrary and capricious under the circumstances." *Democratic Central* at 844.

He further opines:

> "Clearly if the [Washington M.A.T. Commission] were to adopt an accounting procedure like that employed in N.Y. Water Service we would uphold its decision . . . ."

As previously discussed, the Commission in *New York Water* in its accounting procedures directed how a loss or gain from the sale of land should be treated—that is credited to the depreciation reserve; above the line.

ACCOUNTING METHOD PRESCRIBED BY THE PUCA

The PUCA adopted a regulation effective January 1, 1972 whereby gains and losses from the sale of land were to be carried "above the line." The effect of this was that the ratepayers would gain or lose from the sale. The shareholder would not.

Deference is given to a commission's treatment of accounting problems, notwithstanding some incidental intrusion on management prerogatives. *Northwestern Electric Co.* v. *Federal Power Commission,* 321 U.S. 119, 123, 124. The commission was not bound by the traditional concepts of business accounting. Legislative grants of administrative authority on utility accounting are designed to meet needs for information and the public need for economical rates so that inflationary writeups

and expense padding may be avoided. *American Telephone & Telegraph* v. *United States,* 299 U.S. 232, 277, 239-40. The supervision of accounting falls in the class of administrative action and in "gauging rationality regard must steadily be had to the ends that a uniform system of accounts is designed to promote. *A.T.T.* at 237. However, a reviewing court must assure itself that the accounting practice prescribed is consistent with underlying substantive principles of public utility law. *New York Edison Co.* v. *Maltbie,* 281 N.Y.S. 223, 226. Affirmed 271 N.Y. 103.

> "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. *To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not the equivalent of abuse. What has been ordered must appear to be so 'entirely at odds with fundamental principles of* correct accounting' *(Kansas City Southern Ry Co.* v. *United States,* 231 U.S. 423, 444) *as to be the expression of whim rather than the exercise of judgment." American Telephone* at 236, 237. (emphasis added)

And even if the PUCA adopted a uniform accounting system which was not in accord with the "best accounting methods" it is not for the court to determine what is the better practice so long as the commission has not plainly adopted an obviously arbitrary plan. *Northwest Electric Co.* v. *F.P.C.,* 321 U.S. 119, 124.

Moreover, the commission's Uniform System of Accounts does not become suspect because it is challenged.

> "It is the product of expert judgment which carries a presumption of validity. And he who would upset the [system of accounts] carries the heavy burden of making a convincing showing that it was invalid because it is unjust

> and unreasonable in its consequences." *Federal Power Commission* v. *Hope,* 320 U.S. 591, 602.

If the *total effect* of the accounting system cannot be shown to be unjust and unreasonable, then judicial inquiry is at an end. See *Hope* at 602.

The investor has an interest in the financial integrity of the utility and there should be enough revenue not only for operating costs but also for capital costs of the business and expansion. This includes debt service and dividends on stock. And the return should be sufficient to assure financial integrity of the utility so that it can attract capital and maintain a sound credit rating. *Hope* at 603.

When the rate of return authorized by the PUCA is sufficient to satisfy these criteria, it has satisfied both the statutory and constitutional criteria by which it is bound. The ratepayers never were the owners of the land. Nor were the shareholders ever the owners of the land. If, by some quirk, the utility company was ever dissolved, pro-rata division of the assets would be accorded the stockholders available above liabilities. This does not mean, however, that the PUCA cannot give consideration to all of the utility equipment when it considers setting an adequate rate of return. If the rate is adequate to satisfy the statutory and constitutional standards, its duty is done.

The PUCA is authorized and required to set up a Uniform System of Accounts. It has had one since 1922 and has changed it several times since then. Certainly there is no prohibition against changing the accounting system. And there is no prohibition against alterations in the "above the line" and "below the line" categories.

Most cases say that if the shareholder assumes the risk of loss, he should benefit from any gain; that he should not be put in the position of having to undergo risks if he is not to share in any gain. It would be anomalous if he were to take all the risks and the consumers were to take all the gain.

Two of the instant cases arose when PUCA, which had previously ordered the removal of gains from the earned surplus (stockholders) account and ordered them placed in the appropriate column of the operating account, considered these gains in the rate making process.

In PUCA's revised system of accounting, any risk of loss in regard to the land has been totally removed from the shareholders resulting from the sale of land and placed in the operating account where any loss or gain becomes a burden or benefit to the ratepayer. If "benefit follows burden" or "risk of gain follows risk of loss" has any legitimacy, its standards have been satisfied in the revised Uniform System of Accounts.

If this theory is not palatable as sound economic theory, then the statutory grants of authority to the PUCA authorizing it to set up an accounting system and to make appropriate periodic changes, can provide the basis for its action. Working in tandem, it would appear that the action of the PUCA is supportable legally.

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. *Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped.* If the commission's order, as applied to the facts before it and viewed *in its entirety,* produces no arbitrary result, our inquiry is at an end." *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (emphasis added)

While the court in the above quotation was referring to rate making, the observations made therein are just as applicable to the setting up of a system of uniform accounts.

The requirements of the amendments to the Uniform System of Accounts which produced the results complained of here is well within the PUCA's discretion in working out the "balance of interest" here involved, *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380, 392 and is valid unless the affect is outside the *"zone of reasonableness"* in view of the public interest which the PUCA must keep in mind. *Permian Basin Rate Cases* 390 U.S. 747, 797. *Federal Energy Regulatory Commission* v. *Pennzoil Producing Co.,* U.S. ; 99 S.Ct. 765, 772 (1979).

It has been aptly said and repeated by several courts that

> "Regulation may, consistently with the Constitution, *limit stringently* the return recovered on an investment, for investors interests provide only one of the variables in the constitutional calculus of reasonableness." *In re Permian Basin,* 390 U.S. 747, 769. *Bowles* v. *Willingham,* 321 U.S. 503, 518 (emphasis added)

And

> A state has an interest in balancing consumer and investor interests and such a course is constitutional." *Permian Basin* at 769, 770.

The conclusion of the court is that (1) the PUCA was within its authority in adopting the amendments to the Uniform System of Accounts which had the effect of giving consideration to the proceeds of land sales in the rate making process, (2) that its actions were neither arbitrary, capricious or illegal (3) that there was no violation of the Fifth and Fourteenth Amendments to the Constitution, due process and notice being adequate and that (4) there was no confiscation of property without great compensation. The plaintiffs have failed to carry their heavy burden of proof that the system of accounts was illegal, arbitrary or capricious, or that the PUCA's action was statutorily or constitutionally invalid. There was no showing that the rate of return on investment was inadequate, nor insufficient to attract investors.

For the foregoing reasons the following orders may enter in the following cases:

In No. 108038 *Greenwich Water Company, et als.* v. *Connecticut Public Utility Commission, et als.,* a declaratory judgment may enter that Sections 7, 411.6 and 411.7 of the Uniform System of Accounts are legal and valid regulations.

In No. 117874, *Bridgeport Hydraulic Company* v. *Public Utility Control Authority, et al.,* the appeal is *dismissed.*

In No. 015775 *Litchfield Water Company* v. *Public Utility Control Authority,* the appeal is *dismissed.*

GRAHAM, J.
Graham, J.

PUBLIC UTILITIES COMMISSION, STATE OF CONNECTICUT, UNIFORM SYSTEM OF ACCOUNTS PRESCRIBED FOR WATER UTILITIES, CLASS A, §§ 7, 411.6 AND 411.7

7. Land and Land Rights.

A. The accounts for land and land rights include the cost of land owned in fee by the utility and rights, interests, and privileges held by the utility in land owned by others, such as leaseholds, easements, water and water power rights, diversion rights, submersion rights, rights of way, and other like interests in land.

B. Where special assessments for public improvements provide for deferred payments, the full amount of the assessments shall be charged to the appropriate land account and the unpaid balance shall be carried in an appropriate liability account. Interest on unpaid balances shall be charged to the appropriate interest account. If any part of the cost of public improvements is included in the general tax levy, the amount thereof shall be charged to the appropriate tax account.

C. The net profit from the sale of timber, cord wood, or other property acquired with rights of way or other lands shall be credited to the appropriate land and land rights or clearing land account. Where land is held for a considerable period of time and timber on the land at the time of purchase increases in value, the net profit (after giving effect to the cost of the timber) from the sales of timber or its products shall be credited to account 421, Miscellaneous Nonoperating Income.

D. Separate entries shall be made for the acquisition, transfer, or retirement of each parcel of land, and each land right (except rights of way for distribution lines), or water rights, having a life of more than one year. A record shall be maintained showing the nature of ownership, full legal description, area, map reference, purpose for which used, city, county, and tax district in which situated, from whom purchased or to whom sold, payment given or received, other costs, contract

date and number, date of recording of deed, and book and page of record. Entries transferring or retiring land or land rights shall refer to the original entry recording its acquisition.

E. Any difference between the amount received from the sale of land or land rights, less agent's commissions and other costs incident to the sale, and the book cost of such land or land rights, shall be included in account 411.6, Gains from Disposition of Utility Plant, or account 411.7, Losses from Disposition of Utility Plant, Provided such property is recorded in accounts 101-104. If the property being disposed of is recorded in account 105, Property Held for Future Use, or account 121, Nonutility Property; but had previously been recorded in one of the aforementioned utility plant accounts, gains or losses on its sale shall be credited or charged to account 411.6 or 411.7, as appropriate, otherwise to account 421.1, Gain on Disposition of Property, or account 421.2, Loss on Disposition of Property, unless a reserve therefor has been authorized and provided.

NOTE—Significant gains or losses on sale of property, as determined by the Commission, shall be transferred to account 256, Deferred Gains from Disposition of Property, or account 187, Deferred Losses from Disposition of Property; and amortized to account 411.6, Gains from Disposition of Utility Plant, 411.7, Losses from Disposition of Utility Plant, 421.1, Gain on Disposition of Property or 421.2, Loss on Disposition of Property, as appropriate.

F. The cost of buildings and other improvements (other than public improvements) shall not be included in the land accounts. If at the time of acquisition of any interest in land such interest extends to buildings or other improvements (other than public improvements), which are then devoted to water operations, the land and improvements shall be separately appraised and the cost allocated to land and buildings or improvements on the basis of the appraisals. If the improvements are removed or wrecked without being used in operations, the cost of removing or wrecking shall be charged and the salvage credited to the account in which the cost of the land is recorded.

G. When the purchase of land for utility operations requires the purchase of more land than needed for such purposes, the charge to the specific land account shall be based upon the cost of the land purchased, less the fair market value of that portion of the land which is not to be used in utility

operations. The portion of the cost measured by the fair market value of the land not to be used shall be included in account 105, Property Held for Future Use, or account 121, Nonutility Property, as appropriate.

H. Provision shall be made for amortizing amounts carried in the accounts for limited-term interests in land so as to apportion equitably the cost of each interest over the life thereof. (See account 114, Accumulated Provision for Amortization of Utility Plant in Service, and account 404, Amortization of Limited-Term Utility Plant.)

I. The items of cost to be included in the accounts for land and land rights are as follows:

1. Bulkheads, buried, not requiring maintenance or replacement.

2. Cost, first, of acquisition including mortgages and other liens assumed (but not subsequent interest thereon).

3. Clearing (first cost) the land of brush, trees, and debris.

4. Condemnation proceedings, including court and counsel costs.

5. Consents and abutting damages, payment for.

6. Conveyancers' and notaries' fees.

7. Fees, commissions, and salaries to brokers, agents, and others in connection with the acquisition of the land or land rights.

8. Grading the land, except when directly occasioned by the building of a structure.

9. Leases, cost of voiding upon purchase to secure possession of land.

10. Removing, relocating, or reconstructing property of others, such as buildings, highways, railroads, bridges, cemeteries, churches, telephone and power lines, etc., in order to acquire quiet possession.

11. Retaining walls unless identified with structures.

12. Special assessments levied by public authorities for public improvements on the basis of benefits for new roads, new bridges, new sewers, new curbing, new pavements, and other public improvements, but not taxes levied to provide for the maintenance of such improvements.

13. Surveys in connection with the acquisition, but not amounts paid for topographical surveys and maps where such costs are attributable to structures or plant equipment erected or to be erected or installed on such land.

14. Taxes assumed, accrued to date of transfer of title.

15. Title, examining, clearing, insuring, and registering in connection with the acquisition and defending against claims relating to the period prior to the acquisition.

16. Appraisals prior to closing title.

17. Cost of dealing with distributees or legatees residing outside of the state or county, such as recording power of attorney, recording will or exemplification of will, recording satisfaction of state tax.

18. Filing satisfaction of mortgage.

19. Documentary stamps.

20. Photographs of property at acquisition.

21. Fees and expenses incurred in the acquisition of water rights, and grants.

22. Cost of fill to extend bulkhead line over land under water, where riparian rights are held, which is not occasioned by the erection of a structure.

23. Sidewalks and curbs constructed by the utility on public property.

24. Labor and expenses in connection with securing rights of way, where performed by company employees and company agents.

1. UTILITY OPERATING INCOME

Operating Revenues (400)

Operating Expenses:

Operating Expense (401)

Maintenance Expense (402)

Depreciation Expense (403)

Amortization Expense (404-407)

Taxes Other Than Income Taxes (408)

Taxes Other Than Income Taxes, Utility Operating Income (408.1)

Income Taxes (409)

Income Taxes, Utility Operating Income (409.1)

Provision for Deferred Income Taxes (410)

Provision for Deferred Income Taxes, Utility Operating Income (410.1)

Income Taxes Deferred in Prior Years—Cr. (411)

Income Taxes Deferred In Prior Years—Cr., Utility Operating Income (411.1)

Gains from Disposition of Utility Plant (411.6)

Losses from Disposition of Utility Plant (411.7)

Total Utility Operating Expenses

Net Operating Revenues

Income from Utility Plant Leased to Others (412-413)

Total Utility Operating Income

411.6. Gains from Disposition of Utility Plant.

This account shall include amounts relating to gains from the sale or other disposition of utility plant recorded in accounts 101-104; or property recorded in account 105, Property Held for Future Use or account 121, Nonutility Property, which had previously been classified in the aforementioned utility plant accounts. Record income taxes on gains recorded in this account in account 409, Income Taxes.

411.7. Losses from Disposition of Utility Plant.

This account shall include amounts relating to losses from the sale or other disposition of utility plant recorded in accounts 101-104; or property recorded in account 105, Property Held for Future Use or account 121, Nonutility Property, which had previously been classified in the aforementioned utility plant accounts. Record the reductions in income taxes attributable to losses recorded in this account in account 409, Income Taxes.

No. 9651 and 9652

GREENWICH WATER CO., et al

vs.

HOWARD E. HAUSMAN, et al

Supreme Court
State of Connecticut
October 2, 1979

ORDER

The motion of the defendant, Division of Public Utility Control, to dismiss the joint appeal of the Greenwich Water Co. and the New Haven Water Co., and the joint appeal of the Bridgeport Hydraulic Co. and the Litchfield Water Co. having been heard by the Court, it is hereby

ORDERED by the Supreme Court, that said motion be and the same is hereby granted.

BY THE COURT,

RONALD P. SHERLOCK
Assistant Clerk of
Supreme Court

No. 108038
GREENWICH WATER CO., Et Al
vs.
HOWARD E. HAUSMAN, Et Al

Supreme Court
State of Connecticut
September 19, 1979

No. 117874
BRIDGEPORT HYDRAULIC CO.
vs.
PUBLIC UTILITIES CONTROL AUTHORITY, Et al

No. 015775
THE LITCHFIELD WATER CO.
vs.
PUBLIC UTILITIES CONTROL AUTHORUTY, ET AL

ORDER

The Motion of the petitioners Greenwich Water Co., et al, for Reargument and Reconsideration of Petition for Certification for Review and Request for Oral Argument having been presented to the court, it is hereby

ORDERED Denied.

BY THE COURT,

RONALD P. SHERLOCK
Assistant Clerk of Supreme Court

No. 108038
GREENWICH WATER CO., et al
vs.
HOWARD E. HAUSMAN, et al

No. 117874
BRIDGEPORT HYDRAULIC COMPANY
vs.
PUBLIC UTILITIES CONTROL AUTHORITY, et al

No. 015775
THE LITCHFIELD WATER COMPANY
vs.
PUBLIC UTILITIES CONTROL AUTHORITY

Supreme Court
July 24, 1979

ORDER DENYING CERTIFICATION

The plaintiffs, Greenwich Water Company, Mystic Valley Water Company, The Noroton Water Company (now Connecticut-American Water Company) and New Haven Water Company, having filed a petition for certification and the court having considered said petition finds that it should be denied.

Whereupon it is ordered that said petition be and it hereby is denied.

BY THE COURT

THOMAS H. ABRAHAM
Thomas H. Abraham, Clerk

No. 108038
GREENWICH WATER COMPANY, et al
vs.
HOWARD E. HAUSMANN, et al

Superior Court
Judicial District of Hartford-
New Britain at Hartford
December 10, 1979

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the New Haven Water Company, plaintiff in the above-entitled matter, hereby appeals to the Supreme Court of the United States from the final judgment of the Superior Court of the Judicial District of Hartford-New Britain at Hartford of the State of Connecticut declaring that Sections 7, 411.6 and 411.7 of the Uniform System of Accounts are legal and valid regulations, dated May 12, 1979 and filed with the Clerk of the Court on May 14, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

THE PLAINTIFF, NEW HAVEN WATER COMPANY

New Haven Water Company

By DONALD F. KEEFE

Donald F. Keefe
TYLER, COOPER, GRANT,
BOWERMAN & KEEFE
P. O. Box 1936
New Haven, Connecticut 06509
(203) 789-0700
—Its Attorneys—

OFFICE OF THE CLERK
DECEMBER 10, 9:14 AM 1979
JUDICIAL DISTRICT OF
HARTFORD-NEW BRITAIN
AT HARTFORD
STATE OF CONNECTICUT

Certificate of Compliance with Rule 33

This is to certify that a copy of the foregoing was served on the following, being all counsel of record, by depositing the same in a United States mailbox, first class postage prepaid, to Carl Burns, Esquire, P. O. Box 191, 143 Rowayton Avenue, Rowayton, Connecticut 06853; Harold E. Drew, Esquire, P. O. Box 470, Derby, Connecticut 06418; Thomas E. DuPont, Esquire, 23 Academy Street, P. O. Box 267, Danielson, Connecticut 06239; Richard P. Gilardi, Esquire, 855 Main Street, Bridgeport, Connecticut 06604; Robert S. Golden, Jr., Esquire, and William B. Gundling, Esquire, Division of Public Utilities Control, State Office Building, Hartford, Connecticut 06101; Joseloff, August & Sudarsky, 80 State Street, Hartford, Connecticut 06103; Joseloff, August & Sudarksy, 945 Hopmeadow Street, Simsbury, Connecticut 06070; Koskoff & McMahon, 144 West Main Street, Plainville, Connecticut 06062; Maurice Maline, Esquire, 65 Oak View Circle; Bridgeport, Connecticut; Douglas McCallum, Esquire, P. O. Box 176, Unionville, Connecticut 06085; Pinney, Payne, VanLenten & Burrell, 26 West Street, Danbury, Connecticut 06810; Peter A. Treffers, Esquire, P. O. Box 617, New Haven, Connecticut 06509; Rural Water Company, Incorporated, West Redding, Connecticut 06896; Barry S. Zitser, Esquire, Office of Consumer Counsel, Hartford, Connecticut 06114; and to Palmer S. McGee, Jr., Esquire and Allan B. Taylor, Esquire, Day, Berry & Howard, One Constitution Plaza, Hartford, Connecticut 06103 on this 10th day of December, 1979.

DONALD F. KEEFE
.....
Donald F. Keefe

No. 108038

Greenwich Water Company, Et Al.

vs.

Howard E. Hausman, Et Al.

Superior Court

Judicial District of
Hartford-New Britain
at Hartford

December 12, 1979

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Greenwich Water Company, Mystic Valley Water Company and the Noroton Water Company (which three companies have merged and are now known as Connecticut-American Water Company), plaintiffs in the above-entitled matter, hereby appeal to the Supreme Court of the United States from the final judgment of the Superior Court of the Judicial District of Hartford-New Britain at Hartford of the State of Connecticut declaring that Sections 7, 411.6 and 411.7 of the Uniform System of Accounts are legal and valid regulations, dated May 12, 1979 and filed with the Clerk of the Court on May 14, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

THE PLAINTIFFS

By DONALD F. KEEFE
.....
DONALD F. KEEFE
TYLER, COOPER, GRANT, BOWERMAN & KEEFE
P. O. Box 1936
New Haven, Connecticut 06509
(203) 789-0700
—Their Attorneys—

OFFICE OF THE CLERK

DECEMBER 12, 1979
9:29 A.M.
JUDICIAL DISTRICT OF
HARTFORD-NEW BRITAIN
AT HARTFORD
STATE OF CONNECTICUT

Certificate of Compliance with Rule 33

This is to certify that a copy of the foregoing was served on the following, being all counsel of record, by depositing the same in a United States mailbox, first class postage prepaid, to Carl Burns, Esquire, P. O. Box 191, 143 Rowayton Avenue, Rowayton, Connecticut 06853; Harold E. Drew, Esquire, P. O. Box 470, Derby, Connecticut 06418; Thomas E. DuPont, Esquire, 23 Academy Street, P. O. Box 267, Danielson, Connecticut 06239; Richard P. Gilardi, Esquire, 855 Main Street, Bridgeport, Connecticut 06604; Robert S. Golden, Jr., Esquire, and William B. Gundling, Esquire, Division of Public Utilities Control, State Office Building, Hartford, Connecticut 06101; Joseloff, August & Sudarsky, 80 State Street, Hartford, Connecticut 06103; Joseloff, August & Sudarsky, 945 Hopmeadow Street, Simsbury, Connecticut 06070; Koskoff & McMahon, 144 West Main Street, Plainville, Connecticut 06062; Maurice Maline, Esquire, 65 Oak View Circle, Bridgeport, Connecticut; Douglas McCallum, Esquire, P. O. Box 176, Unionville, Connecticut 06085; Pinney, Payne, VanLenten & Burrell, 26 West Street, Danbury, Connecticut 06810; Peter A. Treffers, Esquire, P. O. Box 617, New Haven, Connecticut 06509; Rural Water Company, Incorporated, West Redding, Connecticut 06896; Barry S. Zitser, Esquire, Office of Consumer Counsel, Hartford, Connecticut 06114; and to Palmer S. McGee, Jr., Esquire and Allan B. Taylor, Esquire, Day, Berry & Howard, One Constitution Plaza, Hartford, Connecticut 06103 on this 12th day of December, 1979.

DONALD F. KEEFE

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DONALD F. KEEFE

see

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